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Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Dear Ms. Williams:

On behalf of the Massachusetts Institute of Technology, I am commenting on the proposal to amend the Defense Federal Acquisition Regulations Supplement (DFARS) published in the Federal Register on July 12, 2005 (DFARS Case 2004-D010), which includes a new DFARS Subpart 204.73 "Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities" and an associated contract clause.

Changes in the Export Administration Regulations and the International Traffic in Arms Regulations have been a subject of intense interest to the higher education community since the Inspectors-General reports of last year, particularly the report from the DoD Inspector General. MIT is particularly concerned because of the substantial amount of grant and contract research we perform on campus for DoD ($85.9M, $86.9M and $86.1M for FY03 to FY05 respectively; roughly evenly divided between grants and contracts). We are proud to contribute to our national security through the high quality research that we perform at MIT. The proposed language will cause the inclusion of restrictive clauses into our contracts, making it difficult for us to carry out the research that is so important to our national security. We urge you to issue another revised rule for comment after considering our concerns.

We have four major concerns about the proposed regulations and we provide four recommendations to the DoD:

1. The fundamental research exclusion (FRE) is critical to university research. Issued as National Security Decision Directive 189 in 1985 and reaffirmed in late 2001, this document established the federal government's policy for controlling information and technology created through federally funded research at institutions of higher education. The FRE is clearly established in both the ITAR

and EAR. Because the proposed rule change is intended to be a "clarification of existing responsibilities," it must not neglect this important portion of the existing regulations. By not explicitly recognizing the FRE the proposal in the July 12, 2005 Federal Register notice will, MIT believes, at the least create significant ambiguity. We are concerned that DoD contracting officers may act on a presumption that export control requirements apply to unclassified, fundamental research, which heretofore has been subject to the FRE. We worry that DoD contracting officers are likely to default to including the new clause in most, if not all, university research contracts. **We recommend that NSDD-189, the substance of which also appears in DoD Instruction 5230.27, be explicitly referenced in the proposed regulation as Department of Defense policy. Furthermore, the DFARS should clearly specify that the fundamental research exclusion is also applicable to university subcontracts flowing from industrial or national laboratory contractors.**

2. Given the large response to the recent Advance Notice of Proposed Rulemaking by the Department of Commerce, particularly with respect to the correct interpretation of the deemed export requirement for equipment use technology, we believe that there should be an interagency process that would take into account the community response and clarify and resolve all of these issues in a consistent manner before any changes are made to contract provisions**. We recommend that the National Science and Technology Council working group guide this interagency process. We recommend that changes in the DFARS be deferred until a resolution of the issues is achieved in the interagency process. We also recommend that, in any event, following the comment period, any revised amendment to the DFARS be again open for public comment prior to being enacted.**

3. We are concerned about the overly prescriptive requirements proposed to maintain an "effective export compliance program," particularly the requirements for badging and separate work areas. Furthermore, these requirements go beyond existing regulations, contrary to the statement that the amendment was intended only as "clarification" of existing regulations. Requiring all personnel to wear badges is an extreme measure that should not be necessary under normal circumstances; it would be very costly to implement in a general way on university campuses. Separate work areas are not always possible. Research often depends on access to highly complex, extremely expensive facilities used for multiple research projects. Most of these facilities are not export controlled at all or are exempted from the requirements. In such facilities, separate work areas are impossible; to impose such a restriction would force institutions to duplicate expensive facilities. Therefore, we challenge the statement that "the proposed rule is not expected to have a significant economic impact on a substantial number of small entities…." Even the requirements of the National Industrial Security Program Operating Manual suggest that "other measures as appropriate" are acceptable, and it is hard to understand that the requirements for export

controlled technology on unclassified research activities would be more restrictive than the requirements for classified research. **We recommend that institutions, including MIT, be able to determine the content and management of their compliance program, based upon individual institutional needs and culture.**

4. We are also concerned about the process that DoD would use to identify export controlled technology and about the breadth of the contract provision's applicability. One of the findings of the DoD IG addressed weaknesses in this specific activity; even if program officers are included in the decision making process, there is the possibility of inappropriate identification of technology as export controlled. There is also ambiguity in the proposed regulations, referring in one place to a requirement that the contracting officer identify "any export controlled information and technology" and in another to a requirement to include this new clause in any contracts that "*may* involve the use or generation of export controlled information or technology." It should be made clear that the clause applies only to controlled technology that is not subject to an exclusion from controls and that is provided to the university for work under the contract. **We recommend that the clause be written to require contracting officers to identify *only* export controlled technology that is essential to the execution of the subject contract, and should only be included in contracts that make such identifications.**

Once again, we are proud of MIT's contribution to our national security through the high quality research that DoD sponsors at MIT. We urge you to revise the proposed language so that it does not impair our ability to carry out this important research. We respectfully request the opportunity to comment on another draft revised rule before you issue a final rule.

We appreciate the opportunity to comment and would be pleased to provide any additional information that would be helpful.

Very truly yours,

Alice P. Gast